Supreme Court, U S
FILED
APR 13 2010
OFFICE OF THE CLERK

No. 09-740

IN THE
Supreme Court of the United States

ANTOINE HILL,
Petitioner,

v

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

ANTOINE HILL, PRO SE
#34318-183
FCI Butner Medium II
P O Box 1500
Butner, NC 25709

TABLE OF CONTENTS

REPLY BRIEF 1

A The Circuits Are In Conflict On Whether Exigency Is Required For The Public Safety Exception To Apply 3

B The Government's Standard For Applying The Public Safety Exception And The Lower Court's Application Here Departs From *Quarles* 6

C The Lower Courts Are Divided On Which *Seibert* Standard To Apply When Police Use The Question First, Warn Later Technique But No Evidence Of Deliberate Intent Exists 9

D Had The Court Below Employed The *Seibert* Plurality Standard, The Second Warned Statements Would Have Been Suppressed 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Berkemer v McCarty, 468 U S 420 (1984) 7

Brown v Illinois, 422 U S 590 (1975) 11

Commonwealth v Loadholt, 2010 WL 1209995 (Mass 2010) 6

Dunaway v New York, 442 U S 200 (1979) 11

Mackrill v State, 100 P 3d 361 (Wyo 2004) 5

Missouri v Seibert, 542 U S 600 (2004) 2, 9, 10, 11

New York v Quarles, 467 U S 649 (1984) passim

People v Mohabir, 2010 WL 1254548 (N Y Sup 2010) 6

State v Dailey, 273 S W 3d 94 (Tenn 2009) 9
State v Ferris, 849 N E 2d 985 (Ohio 2006) 9
State v Navy, 688 S E 2d 838 (S C 2010) 10
State v Pye, 653 S E 2d 450 (Ga 2007) 9
United States v Are, 590 F 3d 499 (7th Cir 2009) 5
United States v Carrizales-Toledo, 454 F 3d 1142 (10th Cir 2008) 9
United States v DeJear, 552 F 3d 1196 (10th Cir 2009) 6
United States v Doble, 2009 WL 567995 (9th Cir 2009) 3
United States v Estrada, 430 F 3d 606 (2d Cir 2005) 6
United States v Fox, 393 F 3d 52 (1st Cir 2004) 5
United States v Heron, 564 F 3d 879 (7th Cir 2009) 9
United States v Jones, 154 F Supp 2d 617 (S D N Y 2001) 3
United States v Jones, 567 F 3d 712 (D C Cir 2009) 5
United States v Liddell, 517 F 3d 1007 (8th Cir 2008) 3, 4
United States v Luker, 395 F 3d 830 (8th Cir 2005) 4
United States v Mobley, 40 F 3d 688 (4th Cir 1994) 5
United States v Pacheco-Lopez, 531F 3d 420 (6th Cir 2008) 9
United States v Raborn, 872 F 2d 589 (5th Cir 1989) 5

United States v Williams, 483 F 3d 425 (6th Cir 2007) 6

OTHER AUTHORITIES

Bradley A Dixon, Comment, A CALL TO POLICE THE MARGINS THE EIGHTH CIRCUIT'S EXPANSION OF *MIRANDA'S* PUBLIC-SAFETY EXCEPTION, 75 Mo L Rev 229 (2010) 3

Michael J Roth, Note, *BERKEMER* REVISITED UNCOVERING THE MIDDLE GROUND BETWEEN *MIRANDA* AND THE NEW *TERRY*, 77 Fordham L Rev 2779 (2009) 3

Rorie A Norton, Note, MATTERS OF PUBLIC SAFETY AND THE CURRENT QUARREL OVER THE SCOPE OF THE QUARLES EXCEPTION TO *MIRANDA*, 78 Fordham L Rev 1931 (2010) 3, 6

REPLY BRIEF

The government's position is extreme. They claim that no conflict exists in the lower courts on whether the public safety exception requires exigency, despite the fact that the split has been acknowledged by courts, scholars, and even the government itself just one Term ago. Br. in Opp. 8-11. They further claim that *New York v. Quarles*, 467 U. S. 649 (1984), allows any reasonable threat to the public or police—no matter how far off in time—to justify dispensing with *Miranda* warnings so long as the police "ask questions reasonably prompted by a concern for the public safety." Br. in Opp. 7. And the government fails to directly address why, in this case, the police officer continued to interrogate petitioner on the whereabouts of incriminating evidence, after petitioner responded in a way eliminating any present threat that someone else in the apartment would take control of a firearm.

In contrast to the government's extremist position, petitioner maintains that the lower courts continue to grapple with how to apply the public safety exception, and in doing so, have come to differing conclusions leading to disparate results. Further, the answer to when the public safety exception applies is dictated by *Quarles* itself—only when officers reasonably believe that a threat exists, "circumscribed by the *exigency* which justifies it," *Quarles*, 467 U.S. at 658 (emphasis added). Here, both a reasonable belief and exigency were missing when Officer Bevington decided to forego issuing the warnings this Court has long required.

With regard to the second question, the government admits that the lower courts' analysis of

Missouri v Seibert, 542 U S 600 (2004), is not as "straightforward as in some other contexts when multiple opinions compose a majority of the Court," yet the government contends that lower courts have distilled one standard for question first, warn later techniques employed by law enforcement Br in Opp 15 But the government's *ipse dixit* is no answer for the numerous courts who have noted the division and confusion over *Seibert*, nor the states who have sought certiorari on this very question The government also claims that the "brevity" of the initial questioning "reduced the likelihood" that the *Miranda* warnings were not effective when given " Br in Opp 17 The government, however, has to misconstrue the facts—and badly so—to make this claim

There is widespread confusion on whether the *Seibert* plurality or Justice Kennedy's concurrence should apply when the question first, warn later technique is applied by police and no evidence of the officer's intent in using the technique is present That alone requires this Court's intervention In addition, the first round of questioning here resulted in a comprehensive admittance of guilt, the second round of questioning was a continuation and expansion of the first confession, and there was no intervening curative measure other than officers reading *Miranda* warnings in the station house In such a case, "[i]t would have been reasonable [for petitioner] to regard the two sessions as part of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before", and thus, the questioning completely eliminated the likelihood that *Miranda* warnings were "effective " *Seibert*, 542 U S at 616–17

(plurality opinion) The Court's review therefore is unmistakably in order

A. The Circuits Are In Conflict On Whether Exigency Is Required For The Public Safety Exception To Apply.

As an initial matter, there is widespread acknowledgement that the lower courts are divided on the question of whether exigency is required in applying the *Quarles'* public safety exception *See, e g , United States v Liddell*, 517 F 3d 1007, 1012 (8th Cir 2008) (Gruender, J , concurring), *United States v Doble*, 2009 WL 567995, *2 (9th Cir Mar 6, 2009) (Pregerson, J , dissenting) (noting the tension of an intra-circuit conflict because one line of public safety cases requires exigency and the other does not), *United States v Jones*, 154 F Supp 2d 617, 628 (S D N Y 2001) (courts have taken "divergent approaches to determining the breadth of the public safety exception"), Rorie A Norton, Note, MATTERS OF PUBLIC SAFETY AND THE CURRENT QUARREL OVER THE SCOPE OF THE *QUARLES* EXCEPTION TO *MIRANDA*, 78 Fordham L Rev 1931 (2010) (describing the courts of appeals' decisions as "split," in "conflict" and in "tension") ("Norton, __"), Bradley A Dixon, Comment, A CALL TO POLICE THE MARGINS THE EIGHTH CIRCUIT'S EXPANSION OF *MIRANDA'S* PUBLIC-SAFETY EXCEPTION, 75 Mo L Rev 229 (2010) (noting split), Michael J Roth, Note, *BERKEMER* REVISITED UNCOVERING THE MIDDLE GROUND BETWEEN *MIRANDA* AND THE NEW *TERRY*, 77 Fordham L Rev 2779, 2793 n 111 (2009) (same) Even the government admitted as much last Term when they recognized the "tension" between the Eighth Circuit approach in *Liddell* and those taken by other lower

courts which require exigency *Liddell v United States*, No 08-227, Government's Brief In Opposition, at 13

The government now contends that the courts of appeals' decisions are not conflicting, because they all apply the "*Quarles* standard by asking whether there was a reasonable need to protect the police or the public from an undiscovered weapon in light of the facts presented in each case " Brief in Opp 8 But that is not the quarrel here Of course, the presence of a threat is required by all the circuit courts before the public safety exception is applied *Quarles*, however, does not merely require the presence of a threat at any point in the future, it requires an imminent threat And that immediacy requirement is not required by *all* lower courts when applying the exception

Next, the government attempts to explain away the conflict by confining *all* lower court applications of the exception to instances where "the police had already eliminated any reasonable possibility that someone other than themselves could gain access to an unrecovered weapon " Br in Opp 8 Upon close inspection, this distinction proves illusory given the Eighth and First Circuits' consistent application of the public safety exception well after a scene is secured from outsiders *See, e g , United States v Liddell*, 517 F 3d 1007, 1008–10 (8th Cir) (applying the exception due to the risk of officers "mishandling unknown firearms" despite the fact that the defendant had been arrested late at night, placed in the rear of a patrol car, and determined to be unarmed and alone), *cert denied*, 129 S Ct 627 (2008), *United States v Luker*, 395 F 3d 830, 831–32,

835 (8th Cir 2005) (upholding the exception even though three officers had arrested the defendant, no other people were in the area or the car, and there was no actual evidence of a firearm to prompt the questioning), *United States v Fox*, 393 F 3d 52, 56–57, 60 (1st Cir 2004) (holding that the exception applied to questions asked after the defendant had been patted-down with all weapons and paraphernalia removed from his person, subsequently arrested, and placed in the front of the police cruiser)

The Eighth and First Circuits' rationale for applying *Quarles* in those cases stands in stark contrast to other courts confronted with essentially the same facts, yet flatly refusing to apply the public safety exception *See, e g , United States v Raborn*, 872 F 2d 589, 592, 595 (5th Cir 1989) (court declined to apply the exception, even though officers had full knowledge there was an as-yet-undiscovered weapon, because exigency had expired once the defendant was arrested and the vehicle fully secured), *United States v Mobley*, 40 F 3d 688, 690, 693 (4th Cir 1994) (exception not applied despite the reasonable suspicion of officers that an undiscovered weapon was present in conjunction with suspected cocaine trafficking, because the defendant had already been arrested and found to be alone after a comprehensive sweep of the premises)

What the lower court conflict boils down to is, on the one hand, courts that "broadly apply the *Quarles* exception to inherently dangerous circumstances

devoid of immediacy or actual evidence of a threat,"[1] and on the other, courts holding that "the public safety exception is only warranted where officers have actual knowledge of an imminent threat to public safety "[2] Norton, *supra*, at 1948

Contrary to the government's assertions, the lower court conflict is real, deep, and entrenched Only this Court can rectify the division of authority The Court should therefore grant review

B: The Government's Standard For Applying The Public Safety Exception And The Lower Court's Application Here Departs From *Quarles*.

The government contends that *Quarles* does not necessitate an immediate threat, and instead only requires that "police ask questions reasonably prompted by a concern for the public safety " Brief in Opp 7 (quotation and citation omitted) The government's lone support for this contention is the *Quarles* dissenting opinion describing the *Quarles*

---

[1] *See, e g* , Pet 8–14, *United States v Brady*, 819 F 2d 884, 887–88 (9th Cir 1987), *United States v Are*, 590 F 3d 499, 505 (7th Cir 2009), *United States v Jones*, 567 F 3d 712, 716–17 (D C Cir 2009), *Mackrill v State*, 100 P 3d 361 (Wyo 2004)

[2] *See, e g* , Pet 8-14, *United States v DeJear*, 552 F 3d 1196, 1202 (10th Cir 2009), *United States v Williams*, 483 F 3d 425, 428 (6th Cir 2007), *United States v Estrada*, 430 F 3d 606, 612 (2d Cir 2005), *Commonwealth v Loadholt*, 2010 WL 1209995 (Mass 2010), *People v Mohabir*, 2010 WL 1254548 (N Y Sup 2010)

factual scenario as one lacking immediate danger Id at 6-7 Both the quality and quantity of the government's support is telling on their argument as a whole

First, the *Quarles* majority described the facts and exception in terms much different from the government *See, e g , Quarles,* 467 U S at 657 ("The police in this case, in the very act of apprehending a suspect, were confronted with the *immediate necessity* of ascertaining the whereabouts of a gun "), *id* at 657–58 ("We decline to place officers such as Officer Kraft in the untenable position of having to consider, *often in a matter of seconds*, whether it best serves society for them to ask the necessary questions without the *Miranda warnings* "), *id* at 655 ("In a *kaleidoscopic* situation such as the one confronting these officers, *spontaneity* rather than adherence to a police manual is necessarily the order of the day ") (emphasis added)

Second, the government's argument that officers may ask questions without *Miranda* anytime they are concerned for public safety conveniently omits the limitation the *Quarles* Court attached to the exception—that it is "circumscribed by the *exigency* which justifies it " *Id* at 657 (emphasis added), *see also Berkemer v McCarty*, 468 U S 420, 429 n 10 (1984) (noting that "one exception" to the line of *Miranda* decisions is the public safety exception, which applies "when the police arrest a suspect under circumstances presenting an *imminent danger* to the public safety, they may without informing him of his constitutional rights ask questions essential to elicit information necessary to neutralize the threat to the public") (emphasis added) The *Quarles* Court

included this exigency requirement precisely so as to reign in the public safety exception, ensuring that it remains a "narrow exception" over time *Quarles*, 467 U S at 655

Petitioner's case is a paradigmatic example of the exception expanded in a way to swallow the rule of *Miranda* Several police detectives had conducted surveillance on his apartment, waiting for him to exit so they could carry out a search warrant Suppression Hearing, at 7 ("Supp __") Once petitioner exited the apartment he was arrested and interrogated without *Miranda* warnings There was no immediate danger to the public or police, and in fact, the police *waited approximately one hour* for Detective Bevington to finish the interrogation before they searched the apartment Supp 17 At best, the situation presented a threat that someone else may have remained inside the apartment, although that threat was unlikely given the multiple hours of surveillance and the fact it was midday Supp 13 But that threat (at least as far as questioning petitioner was concerned) was eliminated when petitioner responded that the apartment was empty Supp 8 There was no need for further questioning on the location of a firearm and drugs beyond that for a need to acquire evidence and a confession—a fact Detective Bevington all but admitted at the suppression hearing Supp 14 In such cases, the exigency which justified the public safety exception had vanished and the police were required to give the simple expedient of reading petitioner his constitutionally-endowed *Miranda*

rights [3] For this reason, the Court should grant review

C: The Lower Courts Are Divided On Which *Seibert* Standard To Apply When Police Use The Question First, Warn Later Technique But No Evidence Of Deliberate Intent Exists.

The government maintains that lower courts are not divided on whether to apply the standard elucidated by the *Seibert* plurality and Justice Kennedy's concurrence in that case Br in Opp 14–15 The government's argument is misplaced

While the government is correct that the majority of federal circuits have employed Justice Kennedy's concurrence, Br in Opp 14–15, several others have acknowledged that "it [is] a strain at best to view [Justice Kennedy's] concurrence as the narrowest ground on which a majority could agree" *United States v Heron*, 564 F 3d 879, 884–85 (7th Cir 2009), *see also, United States v Pacheco-Lopez*, 531 F 3d 420, 427 n 11 (6th Cir 2008) (applying both standards), *United States v Carrizales-Toledo*, 454 F 3d 1142, 1151 (10th Cir) (same), *cert denied*, 549 U S 1065 (2006), *State v Dailey*, 273 S W 3d 94, 107 (Tenn 2009) Given the Court's honorable goal of producing judicial economy, the fact that lower courts are wading through both standards when

---

[3] The government's argument on potential vehicle problems with regard to question one is addressed as part of question two because if the Court decides in petitioner's favor on the second question, there is obviously no harmless error on question one

deciding the issue usually signals that this Court must revaluate its approach

In addition, several state courts—in direct conflict with federal circuits—have squarely held that the *Seibert* plurality must guide when the question first, warn technique has been applied *State v Pye*, 653 S E 2d 450, 453 n 6 (Ga 2007), *State v Ferris*, 849 N E 2d 985 (Ohio 2006) And one recent state court decision applied Justice Kennedy's concurrence to an instance where no evidence of a deliberate police practice existed *State v Navy*, 688 S E 2d 838, 842 (S C 2010) Moreover, petitioner is not the first to request certiorari over the lower court confusion of *Seibert* In the past two Terms, the States of Ohio and Texas have both noted the murky area of law and sought this Court's guidance *See Ohio v Ferris*, No 06-464, Petition for Writ of Certiorari, *Texas v Martinez*, No 08-1159, Petition for Writ of Certiorari

The lower courts have struggled with *Seibert*, coming to differing conclusions while employing an inordinate amount of judicial energy The confusion over *Seibert* can only be ended by this Court's guidance

D: Had The Court Below Employed The *Seibert* Plurality Standard, The Second Warned Statements Would Have Been Suppressed.

In arguing that the second warned statements were admissible, the government misconstrues relevant facts and the factors used to determine whether *Miranda* warnings are effective Br in Opp 17–19

First, the government claims that petitioner's responses to the first unwarned interrogation revealed nothing more "than his knowledge of the presence of a gun and drugs in the apartment that he shared with another person." Br. in Opp. 17. Petitioner, however, did not merely answer as to the location of the firearm and drugs in the residence. Rather, petitioner gave several inculpatory statements on heroin dealing, the exact subject for which he was later questioned and indicted. Supp. 8, 15, 24–25. This factor is relevant in determining whether the *Miranda* warnings issued between interrogations were effective. *Seibert*, 542 U.S. at 616.

Second, the government contends that the first and second questioning occurred in "different locations." Br. in Opp. 18. That was not, however, the testimony of Detective Bevington who stated that the first questioning occurred in the "office." Supp. 7. Next, the government claims that a one to two hour break between the first and second interrogations weighs heavily in favor of admissibility on the second statements. But this Court has held in other contexts that a similar time period did not make the second questioning an act of free will sufficient to purge the primary taint from the first questioning. *See Brown v. Illinois*, 422 U.S. 590, 604 (1975), *Dunaway v. New York*, 442 U.S. 200, 218 (1979).

Finally, the government contends that since a different officer read petitioner *Miranda* warnings at the stationhouse, and because that detective did not refer back to the initial interaction, the questioning was distinct and the *Miranda* warnings likely had their affect. Br. in Opp. 18. The former factor is irrelevant given that Detective Bevington was

present and active in both rounds of questioning And with regard to the latter, the government fails to mention that the second questioning covered the exact same ground as the first—petitioner's drug dealing, drug possession and firearm possession Pet App 4a (court of appeals labeled the statements "essentially identical"), Supp 24 (Detective Killingsworth first asked petitioner to elaborate on the firearm located in the apartment) In fact, the second questioning merely expounded on the first, a factor the *Seibert* plurality found persuasive on the question of whether *Miranda* warnings were effective *Seibert*, 542 U S at 615

Given the factual scenario surrounding the first and second questioning, this case presents the ideal vehicle in which to clear up the *Seibert* confusion And since the circumstances dictate that the *Miranda* warnings were not effective, the second statements (like the first), should have been suppressed The Court's review is therefore warranted

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted

Respectfully submitted,

ANTOINE HILL, PRO SE
#34318-183
FCI Butner Medium II
P O Box 1500
Butner, NC 27509